No. 15-674

Supreme Court, U.S.
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In The
Supreme Court of the United States

UNITED STATES OF AMERICA, et al..

Petitioners,

v.

STATES OF TEXAS, ALABAMA, ARIZONA, ARKANSAS, FLORIDA, GEORGIA, IDAHO, INDIANA, KANSAS, LOUISIANA, MONTANA, NEBRASKA, NEVADA, NORTH DAKOTA, OHIO, OKLAHOMA, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, UTAH, WEST VIRGINIA, WISCONSIN; PAUL R. LePAGE, GOVERNOR, STATE OF MAINE; PATRICK L. McCRORY, GOVERNOR, STATE OF NORTH CAROLINA; C.L. "BUTCH" OTTER, GOVERNOR, STATE OF IDAHO; PHIL BRYANT, GOVERNOR, STATE OF MISSISSIPPI; BILL SCHUETTE, ATTORNEY GENERAL, STATE OF MICHIGAN,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF *AMICI CURIAE* FEDERAL COURTS SCHOLARS AND SOUTHEASTERN LEGAL FOUNDATION IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether at least one plaintiff State has standing to challenge the Executive's Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) program.

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INTEREST OF *AMICI CURIAE*

Amici scholars are law professors who teach and write in the field of federal jurisdiction.[1] Our purpose is to support Respondents' claim to standing while remaining agnostic as to the other issues in the case. We hold varying views on the policy merits of the Executive's Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) program, as well as on the legal merits of the States' separation of powers and Administrative Procedure Act challenges to that program. We file this brief in our individual capacities, without purporting to represent the views of our home institutions.

Jonathan Adler is the inaugural Johan Verheij Memorial Professor of Law at the Case Western Reserve University School of Law. Erin Morrow Hawley is an Associate Professor at the University of Missouri School of Law. Bradford Mank is the James B. Helmer, Jr. Professor of Law at the University of Cincinnati College of Law. Garrick Pursley is an Associate Professor at the Florida State University College of Law. Ernest A. Young is the Alston & Bird Professor at Duke Law School.

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[1] All parties have consented to the filing of this brief by blanket or individual letter. *See* Sup. Ct. R. 37.3(a). No counsel for a party has authored this brief in whole or in part, and no person other than *amicus curiae*, their members, and their counsel has made monetary contribution to the preparation or submission of this brief. *See* Sup. Ct. R. 37.6.

Amici Southeastern Legal Foundation (SLF), founded in 1976, is a national non-profit, public interest law firm and policy center that advocates constitutional individual liberties, limited government, and free enterprise. SLF drafts legislative models, educates the public on key policy issues, and litigates regularly before the Supreme Court. As an organization interested in federalism and separation of powers, SLF has a particular interest in the standing of state governments to assert these principles.

SUMMARY OF ARGUMENT

This lawsuit concerns whether the States, which this Court has recognized "bear[ ] many of the consequences of unlawful immigration," *Arizona v. United States*, 132 S. Ct. 2492 (2012), shall have any voice in the legal regime that determines who may be lawfully present within their borders. Our Constitution and federal statutes provide two primary avenues for State input: the States' political representation in Congress, and the opportunity to participate in administrative policymaking through the notice and comment procedures of the Administrative Procedure Act (APA), 5 U.S.C. §§ 500 *et seq*. The gravamen of Respondent States' claims on the merits in this case is that both of these avenues have been shut down by the national Executive's unilateral action in DAPA.

The United States is thus wrong to say that the States' lawsuit asks "the federal courts to resolve

complex debates over immigration policy that the Constitution reserves to the political Branches of the National Government." Pet'r Br. at 12. What the Respondent States ask – and all the court of appeals order below did – is to force the national Executive to conduct those "complex debates" in the political and administrative fora that the Constitution and the APA demand. The fundamentally process-oriented nature of Respondent States' claims on the merits is essential to understanding what is at stake in the arguments about Respondents' standing.

That standing, by this Court's traditional criteria, is straightforward. The States have largely ceded to national authorities the ability to determine who is lawfully present within their own jurisdictions; as a result, the States' own governmental responsibilities necessarily expand and contract in response to changes in national immigration policy. One particularly concrete instance of this is Texas's law requiring issuance of driver's licenses to all persons that the national government determines to be lawfully present. DAPA's expansion of that category increases Texas's costs, and that is sufficient for injury in fact.

The United States does not, in fact, challenge the Respondent States' standing on traditional grounds. Instead, it has invented novel requirements without support in this Court's cases, such as a broad rule against "self-inflicted injury." And it has suggested that the fact that the plaintiffs here are States should cut *against* standing because that somehow transforms a legal dispute over statutory authorization

and administrative process into a political controversy. Neither of these departures from this Court's cases can withstand scrutiny.

Standing in this case requires no special standing loophole for state governments. It simply requires recognition that Respondents are governments, with responsibilities that are in part a function of whom federal law permits to be lawfully present within their jurisdictions. *Amici* take no position on whether Respondents should prevail on their claims, much less on what national immigration policy should be. But there is no doubt that they have standing simply to demand access to national debates about immigration policy.

ARGUMENT

I. Texas's straightforward injury in fact arises directly from its responsibilities as a state government.

Although Texas alleges a variety of injuries, this litigation has focused on the expenses the State will incur on account of DAPA's expansion of the class of persons eligible to apply for state driver's licenses. The United States has characterized this injury as a contrivance based on a quirk of state law. That is unfair and misleading. The point is simply that both the national and state governments are responsible for caring for all persons lawfully present within their jurisdictions. When the national Executive expands

that category by deeming over four million unlawfully present aliens "lawfully present," Pet. App. 413a, the costs of governing not only for the national government but also for state and local governments increase drastically. Texas's driver's license program is simply one particularly concrete example of those increased costs. It is sufficient to answer the standing question in this case.

A. Texas's responsibility for issuing driver's licenses plainly meets this Court's test for Article III standing.

Article III requires a concrete injury in fact, fairly traceable to the challenged government conduct and redressable by the requested relief. *Bennett v. Spear*, 520 U.S. 154, 167 (1997). The costs of issuing driver's licenses are plainly concrete and quantifiable in monetary terms, although this is not required.[2] Nor is the injury widely shared; rather, as a cost of governance, it is shared only by other states with similar driver's license regimes.

The United States has not challenged traceability or redressability here, nor could it do so.[3] Because

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[2] *See, e.g.*, *FEC v. Akins*, 524 U.S. 11, 24-25 (1998) (finding "informational injury" based on an agency's failure to enforce disclosure requirements to be "sufficiently concrete and specific").

[3] The United States' novel argument that Texas's injury is "self-inflicted" does ultimately go to traceability, but it does not claim that the relation between DAPA and the State's increased costs is factually attenuated or uncertain. *See infra* Part II (considering the "self-inflicted" argument).

standing does not turn on the magnitude of the impending injury, it does not matter whether all or even a large number of persons made eligible to remain in the United States by DAPA apply for Texas driver's licenses. The United States does not appear to dispute that *some* of those persons will apply for driver's licenses,[4] and that is sufficient to establish traceability. And of course if the requested injunction renders those persons ineligible to apply, Texas will not incur the costs of issuing them licenses.[5]

Critically, the district court held a hearing on these matters and grounded its standing ruling in specific findings of fact. Those findings of fact concerning the causal connections between DAPA and Texas's injury – which were affirmed by the court of appeals – can be set aside only for clear error.[6] The

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[4] The court of appeals found that "it is apparent that many would do so." Pet. App. at 30a.

[5] *Cf. Massachusetts v. EPA*, 549 U.S. 497, 524-25 (2007) (holding that that plaintiffs may attack a government decision even if it is merely an incremental cause of their injuries, and even if the requested relief would only incrementally mitigate those injuries); *Bennett*, 520 U.S. at 167-68 (holding sufficient to establish an injury to plaintiffs that the agency was likely to reduce the amount of water available to all affected parties, even though it was not yet clear precisely how much plaintiffs' own allocation would be reduced).

[6] Fed. R. Civ. P. 52(a); *Anderson v. Bessemer City*, 470 U.S. 564, 573-74 (1985). Much of the Intervenors' standing discussion asks this Court to look behind the district court's finding, *see* Brief for Intervenors-Respondents Jane Does in Support of Petitioner (Intervenor Br.) at 30-32, but Intervenors' speculation hardly demonstrates clear error.

United States has not argued that any finding by the district court was clearly erroneous.

The United States argues instead that the cost of applications for state benefits is "incidental" to the main purpose of DAPA, which is to determine whom may remain within the country. That is no doubt true; no one says the United States embarked upon this policy with the malign purpose of imposing costs on state governments. But this Court's standing cases recognize no doctrine of "incidental" injury. Government policies frequently inflict harm on parties as a side effect of the government's primary policy goal. The injuries are no less injurious for that, and this Court has frequently relied upon such injuries in recognizing standing.[7] Respondent States do not lack standing here simply because their injuries may be characterized as collateral damage.

B. The cost of issuing driver's licenses to DAPA beneficiaries is simply one example of the way DAPA expands the responsibilities of state governments.

Although the United States characterizes immigration as an area of exclusive federal authority, this

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[7] *See, e.g.*, *Bennett*, 520 U.S. at 167-68 (finding injury in fact where plaintiffs challenged an agency's opinion on biological impacts on endangered species, where that would incidentally result in a reduction in water available for their irrigation operations).

Court's cases have recognized that the matter is significantly more complex. This Court struck down most of Arizona's effort to ratchet up immigration enforcement in *Arizona v. United States*, 132 S. Ct. 2492 (2012), but it upheld that same State's measures limiting employment of undocumented aliens in *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968 (2011).[8] State law and policy are intertwined with the federal immigration regime in a variety of ways.[9] And this Court has acknowledged that States bear many of the costs of unlawful immigration. *See Arizona*, 132 S. Ct. at 2500.

More fundamentally, immigration regulation is unique in that it concerns the scope of the body politic itself. As Justice Scalia observed in *Arizona*, "the power to exclude from the sovereign's territory people who have no right to be there" is "the defining characteristic of sovereignty." 132 S. Ct. at 2511 (Scalia, J., dissenting). That is because power to determine who can enter and who can remain impacts every other function of government. Aliens pervasively interact, for example, with state laws and policies concerning healthcare, education, employment, and public safety. *See generally Alfred L. Snapp & Son, Inc. v. Puerto*

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[8] *See also De Canas v. Bica*, 424 U.S. 351 (1976) (upholding state law prohibiting employment of unauthorized aliens). The United States' brief cites *Arizona v. United States* extensively; it does not acknowledge *Whiting* or the actual holding of *De Canas*.

[9] *See* Cristina Rodriguez, *The Significance of the Local in Immigration Regulation*, 106 Mich. L. Rev. 567 (2008).

Rico, ex rel. Barez, 458 U.S. 592, 601 (1982) (observing that States have an "easily identified" "sovereign interest" in "the exercise of sovereign power over individuals and entities within the relevant jurisdiction").

Although the States have ceded authority to the national government to determine who may lawfully be present within their jurisdictions, that concession hardly erases the profound impact of those determinations upon legitimate state interests. It is hard to think of another aspect of federal policy that more directly affects state governance. To pretend that States cannot be injured by federal immigration decisions is to close one's eyes to the way the world actually works.

C. Texas does not lack standing as a mere "beneficiary" of federal regulation.

The United States suggests Texas lacks standing because it is not directly regulated by federal immigration laws. *See* Pet'r Br. at 20-22. This argument fails for two reasons. First and foremost, Texas's standing rests on the various ways in which DAPA affects Texas's own responsibilities as a governmental regulator and provider of government benefits. Texas need not rely on its status as "beneficiary" of federal regulation for standing. Second, notwithstanding the United States' suggestion, no categorical rule bars beneficiaries of federal regulation from challenging the national government's administration of federal programs.

It is certainly true that persons actually subject to regulatory action nearly always have standing to challenge that action; their difficulties generally involve timing of review. And it is also true that persons challenging governmental regulation of others have faced higher hurdles to establish standing. But it has never been the case that plaintiffs in the latter category were categorically excluded from seeking judicial review of government decisions.[10]

Typically, beneficiaries of regulation struggle to establish standing to challenge agency decisions because, not being direct subjects of regulation, their traceability and redressability scenarios involve a more attenuated string of causal relationships.[11]

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[10] *See, e.g.*, *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 153-56 (2010) (upholding conventional alfalfa growers' standing to challenge agency order deregulating genetically-modified alfalfa on account of possible impacts on their own crops); *Akins*, 524 U.S. at 11 (upholding voters' standing to challenge FEC's decision not to enforce registration and reporting requirements against another organization); *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 403 (1987) (holding securities broker association had standing to challenge agency's policy regulating national banks).

[11] In *Allen v. Wright*, 468 U.S. 737 (1984), for example, this Court denied standing to parents of black children attending public schools to challenge the Internal Revenue Service's alleged failure to deny tax-exempt status to segregated private schools. Pointing out that neither the private schools nor the families attending them were parties to the litigation, the Court held it was too uncertain that the IRS's decisions had undermined desegregation in the public schools or that reversal of those decisions would result in a desegregated education for the plaintiffs' children. *See id.* at 756-58.

And to the extent that the United States warns of an avalanche of litigation if the States prevail here, traceability and redressability are likely to remain significant obstacles in many contexts. But aside from asserting that Texas's injury is self-inflicted, the United States has not contested that Article III's causation requirements are met here. Apart from those requirements, there is no freestanding restriction on claims by regulatory beneficiaries.[12]

In any event, Texas and the other Respondent States need not rest their standing on their status as regulatory beneficiaries. To be sure, they do have interests that fall into that category. Many have argued that illegal immigration undermines the interests of legal workers and increases crime, and to the extent this is true the citizens of Respondent States benefit from the national government's enforcement of the immigration law. In their capacity as

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[12] The United States and its *amici* cite *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 897 (1984), for the proposition that plaintiffs have no "judicially cognizable interest in procuring enforcement of the immigration laws" against another, Pet'r Br. at 20; Brief for Professor Walter Dellinger as *Amicus Curiae* in Support of Petitioners (Dellinger Br.) at 6, but neither acknowledges that *Sure-Tan* was not a standing case or that this Court confined its statement to "private persons like petitioners," who were employers seeking to disqualify employees from voting in a union election. 467 U.S. at 897.

parens patriae, the States have standing to sue to protect these interests.[13]

But Respondent States have an even stronger direct argument that, as a state government, *they* must regulate and, in some cases, provide benefits for persons the national government allows to enter the country and is unable or unwilling to remove.[14] In this way, federal action (or inaction) significantly affects the scope of the States' own responsibilities. To equate Texas with the private plaintiffs denied standing in cases like *Linda R.S. v. Richard D.*, 410 U.S. 614 (1973), *see* Pet'r Br. at 20, is to ignore the crucial fact that Texas is also a sovereign entity and that federal immigration decisions impact the State's own governmental obligations.

In this, immigration is arguably unique. Both the national government and the States must govern the persons they find within their concurrent jurisdictions. But only the national government can determine who is lawfully here or what steps will be taken to exclude or remove those who are *un*lawfully present. Fundamental state interests in the exercise of their own governmental powers are thus inextricably

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[13] *See* Resp't Br. at 30-34; *see, e.g.*, Bradford Mank, *Should States Have Greater Standing Rights than Ordinary Citizens?: Massachusetts v. EPA's New Standing Test for States*, 49 Wm. & Mary L. Rev. 1701 (2008).

[14] *See, e.g., Plyler v. Doe*, 457 U.S. 202 (1982) (holding that Texas cannot deny free public education to undocumented school-age children within its borders).

tied to federal decisions in this field. None of the cases cited by the United States, which involve private individuals seeking to challenge government action or inaction vis-à-vis other private individuals, raise a comparable concern.

II. Texas does not lack standing on the ground that its injury is "self-inflicted."

The United States' central standing argument is that Texas's injury is "self-inflicted" and therefore "not a legally cognizable injury or one that is fairly traceable to the challenged federal policy." Pet'r Br. at 24. But this Court's cases recognize no general doctrine of "self-inflicted injury." On the contrary, the handful of cases that use that phrase refer to a diverse group of much more limited considerations, none of which is applicable here. The novel doctrine proposed by the United States, if adopted by this Court, would revolutionize standing law. And in any event, Texas's injury is not self-inflicted.

A. There is no "self-inflicted injury" rule under Article III.

Amici scholars have taught and written about standing for many years without being aware of any doctrine of "self-inflicted" injury. The closest this Court has come is *Clapper v. Amnesty Int'l*, 133 S. Ct. 1138 (2013), which held *inter alia* that the costs a plaintiff may incur to avoid the impact of a federal policy do not constitute the injury in fact needed to

challenge that policy if the impact of the policy on plaintiffs is itself highly uncertain. The *Clapper* plaintiffs challenged aspects of the Foreign Intelligence Surveillance Act (FISA) that authorized surveillance of certain individuals outside the United States. The plaintiffs – who claimed to engage in communications with persons subject to FISA surveillance – could not demonstrate that they had, in fact, been subjected to any FISA surveillance; instead, they relied on the costs they had incurred to avoid the possibility of such surveillance to establish their injury. Because these costs arose from the plaintiffs' concerns that they *might* be subjected to surveillance, this Court held that "respondents' self-inflicted injuries are not fairly traceable to the Government's purported activities . . . and their subjective fear of surveillance does not give rise to standing." *Id.* at 1152-53.

Clapper holds, at most, that plaintiffs who cannot show they are even subject to a government policy cannot manufacture injury in fact by voluntarily expending resources in anticipation of being subject to that policy. That is not the case here, where the United States cannot and does not dispute that DAPA will apply to persons in Texas and, as a result, affect the operation of Texas's own governmental operations. *Clapper*, moreover, must be read in conjunction with other cases recognizing standing based on injuries that might also be characterized as "self-inflicted." In *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139 (2010), for example, this Court held that

conventional alfalfa farmers had standing to challenge a federal agency's decision to deregulate genetically engineered alfalfa. Although it was uncertain whether the genetically engineered alfalfa would in fact infect nearby conventional alfalfa farms, the plaintiffs undertook costly precautions against such infection. This Court concluded that "[s]uch harms, which respondents will suffer even if their crops are not actually infected with the Roundup-ready gene, are sufficiently concrete to satisfy the injury-in-fact prong of the constitutional standing analysis." *Id.* at 155. If there were a general rule against self-inflicted injuries, then surely *Monsanto* would have come out the other way.[15]

Understandably, the United States does not rely primarily on *Clapper* (and does not mention *Monsanto*). Instead, its best case is *Pennsylvania v. New Jersey*, 426 U.S. 660 (1976) (per curiam).[16] That case considered two separate motions for leave to file complaints in this Court's original jurisdiction concerning taxation

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[15] *Clapper* distinguished *Monsanto* on the ground that the farmers presented "concrete evidence to substantiate their fears," as opposed to "mere conjecture about possible governmental actions." 133 S. Ct. at 1154. This confirms that the problem in *Clapper* was rooted in the uncertainty that the challenged government action would ever apply to the plaintiffs, thus rendering their precautionary expenditures not only self-inflicted but superfluous. Given the evidentiary record and district court findings here, the present case is much closer to *Monsanto* than *Clapper*.

[16] *See, e.g.*, Pet'r Br. at 25 ("*Pennsylvania* controls.").

by one state that allegedly injured other states. The entirety of the relevant discussion in this Court's opinion is as follows:

> In neither of the suits at bar has the defendant State inflicted any injury upon the plaintiff States through the imposition of the taxes held, in No. 69, and alleged, in No. 68, to be unconstitutional. The injuries to the plaintiffs' fiscs were self-inflicted, resulting from decisions by their respective state legislatures. Nothing required Maine, Massachusetts, and Vermont to extend a tax credit to their residents for income taxes paid to New Hampshire, and nothing prevents Pennsylvania from withdrawing that credit for taxes paid to New Jersey. No State can be heard to complain about damage inflicted by its own hand.

Id. at 664. This cursory discussion is the rock upon which the United States rests its "self-inflicted injury" argument.

Pennsylvania simply cannot bear the weight that the United States would place upon it here. The only use of the term "standing" in the opinion occurs in the Court's later discussion of Pennsylvania's additional *parens patriae* claim on behalf of its citizens. *Pennsylvania*, 426 U.S. at 665-66. The Court rejected that claim based on other grounds having nothing to do with self-inflicted injury, and the United States does not appear to rely on that part of the opinion here.

Amici submit that the remainder of *Pennsylvania*'s discussion is best read as not concerning Article III standing at all, but rather as an application of this Court's standard for exercising its original jurisdiction. In *Mississippi v. Louisiana*, 506 U.S. 73 (1992), this Court explained that "[r]ecognizing the delicate and grave character of our original jurisdiction, we have interpreted the Constitution and 28 U.S.C. § 1251(a) as making our original jurisdiction obligatory only in appropriate cases, and as providing us with substantial discretion to make case-by-case judgments as to the practical necessity of an original forum in this Court." *Id.* at 76 (internal quotation marks and citations omitted). One criterion is that "it must appear that the complaining State has suffered a wrong through the action of the other State," *Massachusetts v. Missouri*, 308 U.S. 1, 15 (1939), and it is evidently this requirement that concerned the Court in *Pennsylvania*. Certainly there is conceptual overlap between this requirement and Article III injury in fact, but the original jurisdiction cases do not invoke Article III and there is no reason to believe that the standards are the same.[17] As the Wright & Miller treatise puts it, "[t]he special concerns that have guided the Court in this area [original jurisdiction]

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[17] The standard for this Court's original jurisdiction seems rather higher than the standard for Article III injury in fact. *See, e.g., Texas v. New Mexico*, 462 U.S. 554, 571 n.18 (1983) ("The model case for invocation of this Court's original jurisdiction is a dispute between States of such seriousness that it would amount to *casus belli* if the States were fully sovereign.").

are unique to its own jurisdictional problems, and do not provide a sure basis for analogous reasoning in other areas of state standing."[18]

In any event, the novel requirement proposed by the United States would have radical implications for standing doctrine. The United States suggests that an injury is self-inflicted, and therefore unable to support standing, any time it could have been avoided if the plaintiff had taken some further action. That radical doctrine would eliminate standing in any number of landmark decisions of this Court. The plaintiffs in *Brown v. Board of Education*, 347 U.S. 483 (1954), could have avoided the injury of segregation by homeschooling their children, for example. But because the laws in question were unconstitutional, the plaintiffs were not required to alter their affairs to avoid them.

Most injuries can be avoided by some action or other; the question is whether the plaintiff could have so easily avoided its injury that it lacks any real personal stake in the dispute.[19] Certainly the justiciability rules do not require the States to take evasive action at all costs to avoid injury at the hands of federal law. When a state law has been held invalid

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[18] Richard D. Freer & Edward H. Cooper, 13B Federal Practice & Procedure § 3531.11.1 (3d ed.), Westlaw (database updated April 2015).

[19] *See, e.g.*, *Warth v. Seldin*, 422 U.S. 490, 498 (1975) (observing that "the standing question is whether the plaintiff has alleged . . . a personal stake in the outcome of the controversy").

on federal constitutional grounds, for example, the state has standing to appeal that judgment based on the injury that inheres in not being able to enforce its law;[20] no one says that this injury is "self-inflicted" because the state did not have to enact its law in the first place. Texas was not required here to alter its legal regime to accommodate a change in federal law that injured it, without first having the opportunity to challenge the validity of that federal change. *See, e.g.*, *Alfred L. Snapp & Son*, 458 U.S. at 601 (recognizing a State's "sovereign interest" in "the power to create and enforce a legal code").[21]

B. Texas's injury is not "self-inflicted."

Even if this Court were to adopt a rule foreclosing standing based on "self-inflicted" injuries, no plausible version of that rule would cover Texas's claim here. Texas adopted its policy of permitting all persons legally present in its jurisdiction to apply for driver's licenses long before DAPA, foreclosing any claim that it adopted the policy as a *post hoc* attempt to manufacture standing for its challenge to DAPA.

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[20] *See Maine v. Taylor*, 477 U.S. 131, 137 (1986) (permitting a state government intervenor to appeal a judgment invalidating a state law because "a State clearly has a legitimate interest in the continued enforceability of its own statutes").

[21] *See also* Kathryn A. Watts & Amy J. Wildermuth, Massachusetts v. EPA: *Breaking New Ground on Issues other than Global Warming*, 102 Nw. U. L. Rev. Colloquy 1, 7 (2007) (noting that "the state . . . has a sovereign interest in preserving its own law" that "should be sufficient for Article III purposes").

Compare Clapper, 133 S. Ct. at 1151 ("[R]espondents cannot manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending.").[22] More fundamentally, Texas's reliance on the federal definition of lawful presence was entirely appropriate, given the primary role that federal authorities play in the immigration field.

As a border state with a large immigrant population (both lawful and unlawful), Texas must address which members of this population are eligible for state benefits and services. Given the national government's primary authority over immigration, it is natural for the States to defer to federal decisions as to who is lawfully present when making these decisions. Texas has not made some sort of idiosyncratic choice here; it has not pulled out some obscure provision of federal law and made it the touchstone of eligibility for state benefits. Rather, it has simply decided that, given the federal government's primary role in determining who may lawfully enter the country and whom it will undertake to remove, anyone federal authorities authorize to remain will be eligible for certain state benefits. Indeed, given the United States' repeated emphasis on its exclusive authority over these matters,[23] it is decidedly odd for it to criticize Texas for relying on federal definitions.

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[22] It is only on this narrow point that *Clapper* cited *Pennsylvania*. *See id.*

[23] *See, e.g.*, Pet'r Brief at 13, 19-20.

Adopting the United States' position on "self-inflicted" injury would create perverse incentives for states to adopt their own definitions of lawful presence for purposes of state law, in order to protect themselves from unexpected changes in the federal regime that states would lack standing to challenge.

Critically, the United States has taken the position that States are *not* free to adopt their own definitions that diverge from federal immigration policy. As Texas notes, Resp't Br. at 23 n.20, the United States argued to the Ninth Circuit that because federal power over immigration is exclusive, "a State generally may not establish classifications that distinguish among aliens whom the federal government has treated similarly."[24] In that case, the Ninth Circuit held that both the Equal Protection Clause and (probably) federal preemption precluded Arizona (a respondent in the present case) from "target[ing] DACA recipients for disparate treatment." *Ariz. DREAM Act Coal. v. Brewer*, 757 F.3d 1053, 1064-65 (9th Cir. 2014). *Amici* take no position on whether either the United States' or the Ninth Circuit's views are correct. But surely it is a reasonable course for state governments to avoid these potential conflicts with federal law by incorporating federal definitions in this sensitive

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[24] United States' Brief as Amicus Curiae in Support of Appellees, at 8 in *Ariz. DREAM Act Coal. v. Brewer*, No. 15-15307, U.S. App. LEXIS 14423 (9th Cir. Aug. 2015). *See also* J.A. 309.

field. Such accommodation should hardly be characterized as "self-inflicted injury."

The special role of federal law in the immigration context resolves the United States' concern that state governments will gratuitously incorporate elements of federal law on any number of subjects into their own legal regimes, then use that incorporation as leverage to challenge federal policy. Whether or not that hypothetical is a plausible expectation of how state governments are likely to employ their own limited resources, the field of immigration law is unique on account of federal law's primary role. Although state income tax regimes frequently incorporate the federal definition of taxable income, *see* Pet'r Br. at 32, for example, it is well-settled that the national government lacks exclusive or even primary authority over taxation.[25] State incorporation is a matter of convenience. If this Court wished to limit state standing to challenge changes in federal law that trigger effects under state law, it could sensibly draw the line between gratuitous incorporation of this kind and incorporation that is arguably compelled, such as federal immigration law's definition of lawful presence.[26]

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[25] *See, e.g.*, *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 425 (1819).

[26] *Amici* do not say such a line is essential. Many other constraints limit improvident state challenges, such as resource and political constraints or the possible lack of a cause of action or substantive legal basis for challenging a change in federal tax policy.

The United States' *amicus* make the extraordinary claim that it does not actually matter whether Texas can change its eligibility criteria for driver's licenses: "That there may be constitutional or other limits on Texas's options for changing its driver's-license program to avoid its self-imposed 'harm' does not change the analysis." Dellinger Br. at 15. This is because "[t]hose exogenous constraints do not arise from the Guidance and are therefore not relevant to the question of respondents' standing to challenge it." *Id.*[27] But *amicus* can hardly be arguing that the Respondent States' challenge is better directed at the Supremacy or Equal Protection Clauses. If federal statutory or constitutional law makes state incorporation of federal immigration law non-optional, then injuries arising from changes in federal immigration rules are simply not "self-inflicted."

In any event, DAPA presented Texas with a range of choices, each of which constituted cognizable injury. It could have adopted its own definition of which aliens are eligible for driver's licenses, risking a constitutional challenge and imposing distinctions among aliens that Texas itself may have viewed as unfair; it could have, as the United States insists,

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[27] The United States' *amici* assert that the dormant Commerce Clause would have prevented Pennsylvania changing its tax scheme in *Pennsylvania v. New Jersey*. Dellinger Br. at 15-16 & n.7. The *Pennsylvania* Court's cursory discussion of "self-inflicted" injury did not consider this point, which underscores that that case should not be read as *sub silentio* articulating a fundamental principle of standing doctrine.

raised the fees for driver's license applications to cover its additional costs, which would have entailed either increasing costs for persons it had previously chosen to assist or imposing potentially problematic distinctions among them; or it could have taken no action and simply absorbed the cost of additional driver's license applications. The important point is that each of these choices either involves additional costs or legislative action departing from Texas's preferred legal regime. Each option, in other words, would amount to a concrete injury in fact. And so the fact that DAPA presented Texas with a choice among bad options cannot make its injury "self-inflicted."

III. Recognizing state standing here will vindicate – not disrupt – our constitutional structure.

The United States remarkably asserts that "[i]n the immigration context alone, the court of appeals' theory would give States virtually unfettered ability to conscript courts into entertaining their complaints about federal policies." Pet'r Br. at 31. And it worries that "States could interfere with the federal government's administration of the law in many other contexts as well." *Id.* at 32. This rhetoric presupposes a conclusion. Parties with valid injuries in fact do not "conscript" courts into hearing their legal claims, and valid claims that a federal agency has exceeded its statutory authority or omitted necessary procedural steps do not "interfere" with federal administration. But the United States may be making a broader point

about the separation of powers – that is, that major public controversies should not be resolved in court, especially not at the behest of institutional actors like state governments.

Article III, of course, contains no exception for major controversies, and any rule that sought to distinguish between major and minor disputes would be hopelessly indeterminate. Moreover, nothing in Article III limits the rights of States to pursue their own claims in federal fora.[28] Instead, this Court has said States are "entitled to special solicitude in our standing analysis." *Massachusetts v. EPA*, 549 U.S. 497 (2007). States are, in fact, particularly appropriate litigants for aggregating the diffuse interests at stake in controversies like this one. And precisely because they are governments, the States suffer more concrete harms.

Critically, the gravamen of Respondent States' claims on the merits in this case is that the ordinary processes for resolving policy disputes about immigration or other issues have been cut off by the federal Executive's unilateral action. The States are

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[28] One perverse consequence of the United States' position would be to encourage States to litigate these sorts of disputes in their own courts. If the United States is right about Article III standing, then these cases would not be removable to federal court, and it is unclear that the state courts would lack authority to issue some relief. *See, e.g.*, Richard H. Fallon, Jr., John F. Manning, Daniel J. Meltzer, & David L. Shapiro, Hart and Wechsler's The Federal Courts and the Federal System 435-37 (7th ed. 2015) (noting continuing uncertainty).

politically represented in Congress, but the States' claim is that the Executive has circumvented the legislative process here. And States are entitled to participate in the administrative process as well, but the States argue that the federal Executive has prevented that by denying notice and comment under the APA. These aspects of the case both make the States' standing particularly pressing here and provide potential limiting principles in future litigation.

A. The States are effective litigants for vindicating diffuse interests.

Massachusetts v. EPA's "special solicitude" for States' standing makes sound functional sense, because States will often be uniquely appropriate litigants for certain sorts of claims. States can play this role, moreover, without requiring this Court to recognize any special rule of standing for state litigants. All that is necessary is to recognize that States are governments, and governments have interests and responsibilities that private litigants may not share.

One of the most difficult problems in federal practice and procedure concerns the appropriate mechanisms for aggregating claims that affect large numbers of people but that individual litigants lack the incentives or the wherewithal to pursue. Standing doctrine often creates or exacerbates the aggregation problem. Here, for example, the persons most directly affected by DAPA are the unlawfully present aliens

granted legal presence. These persons, of course, are unlikely to challenge the program. But the natural persons arguably injured by DAPA – the voters whose representatives voted for the federal statutes that DAPA arguably transgresses, or the federal and state taxpayers whose resources will be diverted to pay DAPA's significant expenses – lack individual standing under settled law.

Our law has adopted a number of solutions – such as class actions or organizational standing – for aggregating claims that are impracticable to bring on an individual basis. But these mechanisms all have their problems, and none addresses the lack of individual standing when injuries occur to diffuse public interests. States, however, are empowered by state constitutions and the Tenth Amendment to represent the diffuse public interest of their citizens.

One significant advantage that States have over private organizations and class actions is that they have built-in mechanisms of democratic accountability for their conduct of litigation on behalf of their citizens.[29] Justices of this Court have complained that the use of "private attorneys general" to enforce federal law raises significant problems of public accountability, and similar concerns exist about

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[29] Mank, *supra*, at 1784 (discussing checks on state litigation).

accountability of class counsel in class actions.[30] State officials who sue on behalf of their citizens *are* politically accountable for their actions, however. A recent re-election campaign by the Texas Attorney General, for example, featured public debate about the appropriateness of the State's participation in litigation challenging the Affordable Care Act.[31]

Litigation by States fits well into a constitutional system predicated on the notion that no one person or institution can lay a unique claim to the public interest. Our system of both vertical and horizontal checks and balances recognizes that the public benefits when multiple institutions can step in if a particular officer or agency fails to pursue the public welfare or respect legal constraints. Even in an area of strong national interest like immigration, the national Executive is not, and cannot be, judge in its own case. By according "special solicitude" to States' standing, *Massachusetts v. EPA* facilitated States' valuable role in the process by which every political institution is held accountable to the rule of law.

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[30] *See, e.g.*, *Akins*, 524 U.S. at 36 (1998) (Scalia, J., dissenting) (criticizing private attorneys general); *In re GMC Pick-Up Truck Fuel Tank Prod. Liab. Litig.*, 55 F.3d 768, 788 (3d Cir. 1995) (noting concern about lack of accountability of class counsel).

[31] *See* Chuck Lindell, *Texas Attorney General Greg Abbott Opposes Federal Government on Many Fronts*, Austin American-Statesman, Aug. 7, 2010, *available at* http://www.statesman.com/news/texaspolitics/texas-attorney-general-greg-abbott-opposes-federal-government-847623.html?printArticle=y.

DAPA's impact on the public is diffuse. But because States, as governments, are immediately responsible for governing whomever the national government decides to allow to remain within the country, States suffer direct and immediate consequences. The cost of issuing driver's licenses, as we have said and the district court found, is only the most salient example.

B. The government action challenged here has cut off States' ordinary political and administrative remedies.

Throughout their submissions, the United States and its *amici* assert that this dispute should be reserved to the national political branches. *See, e.g.*, Pet'r Br. at 12. There is a deep irony to this claim, because the essence of the States' argument is that the national Executive has circumvented the political and administrative processes that would otherwise give States a voice. These processes include the ordinary legislative process in Congress, which represents the States, as well as the APA's notice and comment procedure, which would ordinarily afford affected States an opportunity for direct participation.

This Court recognized in *Snapp* that "the State has an interest in securing observance of the terms under which it participates in the federal system." 458 U.S. at 607-08. And the federalism jurisprudence has long acknowledged that "the principal means chosen by the Framers to ensure the role of the

States in the federal system lies in the structure of the Federal Government itself" – particularly the representation of the States in Congress. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 550 (1985).[32] This Court has given life to these "political safeguards" of federalism by insisting that Congress make the crucial decisions that affect important state interests.[33] Whether or not these political safeguards are sufficient to obviate the need for judicial enforcement of other constitutional limits on national authority, doctrines protecting Congress's role have been critical to sustaining our federal structure.[34]

It is thus crucial that States have standing to complain when Congress – and therefore States representation in that body – is cut out of the loop. If States have standing to make no other constitutional objection, they must nonetheless be allowed to make this one. Because Congress's role supplies the bulwark protection for state interests, the circumvention of the legislative process that Respondent States

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[32] *See also* Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 Colum. L. Rev. 543 (1954).

[33] *See, e.g.*, *Gregory v. Ashcroft*, 501 U.S. 452, 464 (1991) ("[I]nasmuch as this Court in *Garcia* has left primarily to the political process the protection of the States against intrusive exercises of Congress' Commerce Clause powers, we must be absolutely certain that Congress intended such an exercise.").

[34] *See, e.g.*, Ernest A. Young, *Two Cheers for Process Federalism*, 46 Vill. L. Rev. 1349 (2001).

allege here works a unique injury to their interests. And the United States cannot be heard to argue that this dispute over immigration policy should be deferred to political resolution when the national Executive has made an end-run around that very political process in which Respondent States would otherwise have been represented.

The other possible avenue for state participation in a policy debate over immigration would be through the notice and comment procedure guaranteed by the APA. To be sure, the APA puts state commenters on the same plane as any private party, rather than affording them the structural representation they receive in the national legislative process. But at least notice and comment is a form of participation. Respondent States claim here that they have been wrongfully denied that very opportunity to participate. Whatever other claims the States may or may not have standing to bring, they must at least have standing to challenge the decision to foreclose their participation in administrative decisions that cause them concrete injury.

The political process to which the United States asks this Court to defer, therefore, is simply the internal deliberations of the national Executive Branch. The Executive would be judge in its own case, having cut off both legislative debate and participatory agency deliberation. Having been excluded from the avenues of participation ordinarily open to them, the Respondent States must at a minimum have standing to challenge their exclusion.

IV. The Respondent States have standing under the APA.

The United States argues that the Respondent States lack standing because they do not fall within the zone of interests of the Immigration and Naturalization Act (INA), 8 U.S.C. §§ 1101 *et seq.* Pet'r Br. at 33-36. On its own terms, this argument rests on an overly cramped reading of the INA's purposes. But in any event, the United States misconceives the relevant legal provisions for its zone of interests argument. Respondent States have raised claims not only that DAPA is inconsistent with the INA, but also that the Executive has failed to meet its obligations under the notice and comment provisions of the APA and the Take Care Clause, U.S. Const. art. II, § 3. Standing to bring those claims turns on the respective zones of interests of those provisions, not the INA.

The Respondent States have sued under Section 10 of the APA, which provides that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702. Speaking of this language, then-judge Scalia observed that "[t]he zone of interests adequate to sustain judicial review is particularly broad in suits to compel federal agency compliance with law, since Congress itself has pared back traditional prudential limitations by the [APA]." *FAIC Sec., Inc. v. United States*, 768 F.2d 352, 357

(D.C. Cir. 1985) (internal quotation omitted).[35] More recently, he wrote for this Court that "in the APA context, . . . the [zone of interests] test is not 'especially demanding.'" *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1389 (2014) (quoting *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S. Ct. 2199, 2210 (2012)). "In that context," the *Lexmark* Court explained, "we have often 'conspicuously included the word 'arguably' in the test to indicate that the benefit of any doubt goes to the plaintiff,' and have said that the test 'forecloses suit only when a plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that' Congress authorized that plaintiff to sue." *Id.* (quoting *Patchak*, 132 S. Ct. at 2210).

The United States cannot make that showing here. Its argument is that "Respondents cannot satisfy this [zone of interests] requirement because no relevant statute protects a State from bearing the costs of a voluntary state-law subsidy for driver's licenses." Pet'r Br. at 34. Aside from conflating zone of interests with their self-inflicted injury argument, the United States' assertion runs directly counter to this Court's repeated admonition that "[w]e do not require any 'indication of congressional purpose to benefit the would-be plaintiff.'" *Patchak*, 132 S. Ct. at 2210

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[35] In *Akins*, 524 U.S. at 19, this Court said that "[h]istory associates the word 'aggrieved' with a congressional intent to cast the standing net broadly."

(quoting *Clarke*, 479 U.S. at 399-400). The question, in other words, is whether issues concerning who may lawfully remain in the United States, and the extent to which immigration imposes obligations on affected governments, fall within the scope of the INA.[36] That question answers itself.

The scope of the INA is not the question, however, when it comes to Respondents' claims under the Take Care Clause and the notice and comment provisions of the APA.[37] The United States is correct that when a party sues under the general provisions of the APA to challenge the consistency of agency action with some other statute, such as the INA, then the relevant zone of interests concerns that other statute. But the right to notice and comment is created by the APA itself; for suits seeking to enforce that requirement, then, the APA both creates the cause of action and the underlying procedural right to be enforced. As this Court recognized in *Lexmark*, "[w]hether a plaintiff comes within the 'zone of interests' is an

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[36] *Cf. Patchak*, 132 S. Ct. at 2210 n.7 (recognizing that Indian Reorganization Act, authorizing acquisition of land for Indian tribes, was not meant to benefit non-Indian landowners who live nearby, but holding that the zone of interests question was simply "whether issues of land use (arguably) fall within [the IRA's] scope – because if they do, a neighbor complaining about such use may sue to enforce the statute's limits").

[37] Even if Respondents' notice and comment claim had to fall within the zone of interests of the INA itself, it would surely do so. *See Arizona*, 132 S. Ct. at 2508 ("Consultation between federal and state officials is an important feature of the immigration system.").

issue that requires us to determine . . . whether a legislatively conferred cause of action encompasses a particular plaintiff's claim." 134 S. Ct. at 1387. Respondents are entitled to sue because they are "aggrieved," 5 U.S.C. § 702, by the denial of their procedural rights under 5 U.S.C. § 553. And there is no doubt that the latter provision embodies broad interests in participation by persons affected by agency action.[38]

Government entities whose own regulatory responsibilities will be affected by national agency action fall squarely within the zone of interests protected by the APA notice and comment requirement.[39] A recent Eighth Circuit decision provides a good example. In *Iowa League of Cities v. EPA*, 711 F.3d 844 (8th Cir. 2013), local governments challenged an EPA action for effectively making new legislative rules without notice and comment in violation of procedural requirement in both the Clean Water Act (CWA) and the APA. Ruling that the cities had established Article III standing, the court of appeals recognized that "[t]he League's members have a concrete interest not only in being able to meet

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[38] *See, e.g.*, *Chrysler Corp. v. Brown*, 441 U.S. 281, 316 (1979) ("In enacting the APA, Congress made a judgment that notions of fairness and informed administrative decisionmaking require that agency decisions be made only after affording interested persons notice and an opportunity to comment.").

[39] *See generally* Comment, *State Standing to Challenge Federal Administrative Action: A Re-Examination of the* Parens Patriae *Doctrine*, 125 U. Pa. L. Rev. 1069, 1094-1103 (1977).

their regulatory responsibilities but in avoiding regulatory obligations above and beyond those that can be statutorily imposed upon them. Notice and comment procedures for EPA rulemaking under the CWA were undoubtedly designed to protect the concrete interests of such regulated entities by ensuring that they are treated with fairness and transparency after due consideration and industry participation." *Id.* at 871.[40]

The analysis concerning Respondents' Take Care claim is similar. The United States makes two arguments concerning the Take Care Clause relevant to justiciability. The first is that this claim raises a nonjusticiable political question because "to undertake such an inquiry would express a 'lack of the respect due' to the Nation's highest elected official." Pet'r Br. at 73 (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)). Courts do not dismiss constitutional claims on the ground that they are disrespectful to the government, of course, and no decision of this Court has ever found a case nonjusticiable on this ground.

The second argument is that the Take Care Clause does not furnish a cause of action. But as Respondents note, Resp't Br. at 73, there is a long

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[40] Although the quoted language emphasized notice and comment procedures in the CWA, the plaintiff cities also sued under the APA and the court cited this Court's APA cases. *See* 711 F.3d at 871 (citing *Chrysler Corp.*, 441 U.S. at 316).

history of equitable relief against executive officials acting in violation of law, and in any event it is unclear why the APA would not also provide a vehicle for a Take Care claim. In the latter situation, the relevant question would be whether plaintiffs fell within the zone of interests of the Take Care Clause itself, not the INA. Whether the Take Care Clause creates enforceable rights and the exact contours of the obligations it imposes on the Executive are, to be sure, difficult questions. But if there are problems with Respondents' Take Care claim, they do not arise from the zone of interests doctrine.

It is true that many potential plaintiffs fall within the zone of interests of the APA's notice and comment provisions and the Take Care Clause as we have construed them. But that simply reflects the fact that the zone of interest test is "not especially demanding," *Lexmark*, 134 S. Ct. at 1389, especially in the APA context. The more important constraints arise from Article III. Given the Respondent States' allegation of a concrete injury in fact under the constitutional standard, the zone of interests arguments raise no additional bar here.

CONCLUSION

The judgment of the U.S. Court of Appeals for the Fifth Circuit should be affirmed insofar as it upheld the States' standing to sue in this matter.

Respectfully submitted,

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